82-1755

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

**ALFRED BRANCHE, FRED JACOBAZZI, and KEITH BASS,**

*Petitioners,*

vs.

**ROLLINS FREEMAN,**

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1) A state prisoner was struck twice in the face by a correctional officer and received a black eye. Was the jury properly instructed that the prisoner could recover damages not only for the actual physical injury he sustained, but also for the asserted violation of his constitutional rights?

2) Does the Due Process Clause of the Fourteenth Amendment, standing alone, provide the prisoner a cause of action, separate from and independent of the Cruel and Unusual Punishment Clause of the Eighth Amendment, upon which he may recover damages from the defendants?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Alfred Branche, Fred Jacobazzi, and Keith Bass, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 15, 1982.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 695 F.2d 485. The opinion is contained in Appendix A, pp. 1-15.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1982 (Appendix B). A timely petition for rehearing was denied on February 1, 1983 (Appendix C), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 14, sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Code, Title 42:

> Section 1983. *Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF THE CASE

### A. Background

The respondent, Rollins Freeman, is a former inmate of the Stateville Correctional Center, a maximum-security prison operated by the Illinois Department of Corrections and located in Joliet, Illinois. He filed an action under 42 U.S.C. 1983 in the United States District Court for the Northern District of Illinois against various supervisors and correctional officers at Stateville regarding an incident which occurred there on March 26, 1979. The petitioners are three correctional officers.[1]

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[1] At trial, there were six defendants, only three of whom have filed this petition. George May, an administrative assistant to the Warden, was directed out of the case at the close of the evidence; Lowell Roofener and Roosevelt Fleming were found not guilty by the jury. The plaintiff did not appeal these verdicts in the Court of Appeals. A seventh defendant, Gayle Franzen, the Director of the Illinois Department of Corrections, was dismissed from the case on a preliminary motion to dismiss.

During the months of February and March, 1979, Stateville was in the midst of a large-scale reorganization. The entire prison was being systematically searched for contraband. Large numbers of correctional officers from other institutions were brought in to assist in the search operation. During this time, prisoners were transferred from their assigned cellhouses to another cellhouse designated as a holding area. Each emptied cellhouse was then searched in turn.

On March 26, 1979, the inmates in Cellhouse B-West, including Rollins Freeman, were to be transferred to the holding area, Cellhouse B-East, so that B-West could be searched. At approximately 3:00 P.M., a shakedown team of correctional officers entered B-West to begin transferring inmates. Several correctional officers, including the petitioners, were in Cellhouse B-West at that time.

### B. Disputed Testimony

#### (i) The Inmate's Version

It was undisputed that Lt. John Harris, the supervisor of a shakedown team, approached the plaintiff's cell on One Gallery and told him to prepare to be moved. After that point, however, Freeman's version of what happened differed sharply from the officers' version. Freeman's version follows.

Freeman testified that he was sleeping in his cell when Lt. Harris appeared. He claimed that after a short interval, Lt. Harris reappeared with two unidentified correctional officers. The two officers entered Freeman's cell, twisted his arms behind his back, and rushed him out of his cell on tiptoe toward the doorway of Cellhouse B-West. Freeman claimed that Officer Rooffener hit the plaintiff twice in the forehead at the doorway. He also

claimed that Officer Jacobazzi was choking him and that Lt. Roosevelt Fleming was hitting him in the testicles.

Freeman said that he was then thrown to the ground, picked up, and carried through the doorway. Freeman said that at that point, Capt. Branche struck him in the face. Freeman grabbed Branche's coat and pulled Branche toward him. Branche then struck Freeman a second time. After being carried to a stairway, Freeman was handcuffed. He was then carried up the stairs by Officers Bass and Jacobazzi. Freeman testified that he was dragged up the stairs, and that Bass and Jacobazzi were kneeing and kicking him in the back. Freeman was then brought to a cell on a higher gallery.

Curtis Cottrell, a former correctional officer at Stateville, testified for the inmate that there was a "scuffle" on the gallery involving Jacobazzi, Fleming, and Rooffener, and that they were treating Freeman "pretty roughly."

**(ii) The Officers' Version**

Lt. Harris testified that when he approached Freeman's cell on One Gallery, Freeman told Lt. Harris that he was refusing to leave his cell, that he had asthma, and that he did not want to be placed on a high gallery in the cellhouse. Lt. Harris told Freeman a nurse would be sent to evaluate him after he was moved. Lt. Harris opened the cell, and Freeman stepped out. Immediately after that a struggle began between Freeman and several correctional officers in the area. Freeman was kicking as officers tried to subdue him. Lt. Harris testified that at no time did any correctional officers enter Freeman's cell, twist his arms behind his back, or rush him out of the cell on tiptoe.

Capt. Alfred Branche, who was some distance away from Freeman's cell at this time, was informed that there was a fight occurring on the gallery. He walked to the area where Freeman was on the ground being restrained by other officers. Capt. Branche ordered the officers to carry the inmate off the gallery. Officers were holding each arm and leg of the respondent. Capt. Branche was holding Freeman's left arm. The plaintiff was carried in a horizontal position through a doorway leading out of the cellhouse.

At the doorway, Freeman freed his hand and struck Capt. Branche. Capt. Branche responded in kind. Freeman then took hold of Capt. Branche's coat and attempted to pull Capt. Branche toward him, knocking Capt. Branche's cap off. Capt. Branche then hit Freeman a second time in an attempt to extricate himself from Freeman's grasp. While Capt. Branche was attempting to break loose from Freeman, Officer Rooffener broke Freeman's grasp by twice bringing his arms down on Freeman's forearm.

The respondent was finally subdued and handcuffed at the base of the stairway. Officers Bass and Jacobazzi carried the inmate up the stairs and placed him in a cell on another gallery.

Bass and Jacobazzi denied that Freeman was mistreated on the stairway in any way. Jacobazzi denied choking Freeman. Rooffener denied that he had hit Freeman in the face. Fleming denied that he had struck Freeman in the testicles. There was no dispute that Branche struck Freeman twice in the face, although each said the other struck the first blow.

The Illinois Department of Corrections had several cameramen in the cellhouse filming the inmate transfers

on March 26, 1979. These films, which were made to document the seizure of contraband, and to record any other unusual incidents during the reorganization, were shown to the jury. Although the cameramen did not record the entire incident, the films did show that Freeman received a "black-eye" on his left side as a result of being struck by Branche.

No medical testimony was presented by either side. The parties stipulated that Freeman had suffered no permanent injury to his eye as a result of the incident.

### C. The Jury's Verdict

The jury found in favor of defendants Fleming and Rooffener. The jury found in favor of Freeman and against the three petitioners as follows: against Branche, $2,500 compensatory and $1,000 punitive damages; Jacobazzi, $250 compensatory damages; and Bass, $250 compensatory damages.

With its verdict, the jury attached the following note:

> "We the jury, because of reasonably (sic) doubt and a lack of sufficient evidence, recommend that the following be instructed and explained:
>
> Mr. Jacobazzi and Mr. Bass, or any other correction officers involved in moving residents in large scale security checks, should be cautioned and instructed in the following manner:
>
> Specifically speaking of the manner in which a person is carried upstairs within Stateville Correctional Center, caution and care should be taken to insure safe and humane methods of (sic) residents or prisoners so no bodily harm or fear is experienced by them."

The District Court granted the motions of Bass and Jacobazzi for judgment notwithstanding the verdict. It

granted the motion of Branche for judgment notwithstanding the verdict as to punitive damages only. The Court of Appeals reversed and reinstated all the jury verdicts.

### D. Jury Instructions

The jury was instructed as follows on the question of damages:

> "If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the wrongful conduct of the defendant or defendants.
>
> One, the nature, extent, and duration of the injury.
> Two, general pain and suffering.
> Three, humiliation.
> Four, mental distress.
> Five, the violation of the constitutional right.

The District Court also instructed the jury that the plaintiff could recover on an Eighth Amendment theory or on a substantive Fourteenth Amendment theory, as separate theories of liability.

The defendants made timely objections in the District Court to the damage instruction permitting compensation for "violation of the constitutional right" and the liability instructions premised solely on the Fourteenth Amendment.

## REASONS FOR GRANTING THE WRIT

1.

**THE DECISION BELOW IS IN CONFLICT WITH THE JUDGMENT OF ANOTHER COURT OF APPEALS AND PRESENTS AN IMPORTANT AND RECURRING QUESTION CONCERNING THE PROPER SCOPE OF DAMAGES UNDER 42 U.S.C. 1983.**

This case presents an important and recurring question concerning the measure of damages under 42 U.S.C. 1983. That question is whether a Section 1983 plaintiff who claims a violation of his substantive constitutional rights—in this instance, rights grounded in the Eighth Amendment—may recover damages for the intrinsic value of the constitutional rights involved.

In this case, the plaintiff had the benefit of a damage instruction which permitted him full compensation for whatever actual injury he sustained. He also asked for, and received, punitive damages. But in addition, the Seventh Circuit held that the plaintiff could recover damages for "the violation of the constitutional right."

Whether or not this holding is consonant with 42 U.S.C. 1983 and this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), is a question requiring this Court's plenary consideration.

In *Carey v. Piphus*, this Court held that the plaintiffs, students who had been suspended from their public schools without procedural due process, could not recover compensatory damages unless they proved actual injury resulting from the due process violations. This Court recognized that damage awards under the common law were meant to provide compensation for actual injuries, and that damage awards under 42 U.S.C. 1983 should follow that fundamental principle.

Moreover, the Court in *Carey* stated that common law tort rules "provide the appropriate starting point" in deciding the proper scope of damages under 42 U.S.C. 1983:

> "In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. *In such cases, it may be appropriate to apply the tort rules of damages directly to the Section 1983 action* . . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts." *Id.* at 258 (Emphasis added).

The Courts of Appeals applying *Carey* in cases involving alleged violations of substantive constitutional rights are in conflict. In cases involving police brutality where plaintiffs have suffered significant personal injuries, the Courts of Appeals have read *Carey* very narrowly, and sustained jury instructions which permit compensation for the inherent violation of a constitutional right. See *Corriz v. Naranjo*, 667 F.2d 892, 897-898 (10th Cir. 1981);[2] *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981).[3] In these cases, damage awards were not limited to compensating actual injury.

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[2] In *Corriz*, the jury was instructed as follows:

"If you find that the plaintiff has been deprived of a constitutional right, or several constitutional rights, you may award him damages for the deprivation . . . The precise value you place upon any and each constitutional right which you find was denied to plaintiff is within your discretion . . . ." *Id.* at 897.

[3] In *Herrera*, the jury was instructed as follows:

"If you find that the plaintiff has been deprived of a constitutional right, you may award damages to compensate

(Footnote continued on following page)

Those decisions, and the decision of the Seventh Circuit below, are in conflict with *Phillips v. District of Columbia*, (U.S. Court of Appeals for the District of Columbia Circuit, No. 80-2171, decided January 11, 1983).[4] In *Phillips*, the plaintiffs, inmates at the Lorton Maximum Security Facility sought money damages for alleged Eighth Amendment violations. The District Court instructed the jury that

> "If you find that defendant (sic) deprived plaintiffs of constitutional rights, you may award plaintiffs damages for that deprivation." *Id.* at slip. op. p. 13, App. p. 31).

The District of Columbia Circuit held that this instruction was in error. The Court stated that *Carey v. Piphus* "intended to require, not just that plaintiffs demonstrate actual injury before they secure more than a nominal recovery, but that damage awards be *limited* to sums necessary to compensate plaintiffs for actual harm." *Id.* at p. 14; App. p. 33. (Emphasis in original).

In the Seventh Circuit decision we seek to have reviewed here, the Court of Appeals reasoned that because the plaintiff had sustained an actual injury, the jury charge was not in error. The Seventh Circuit stated that the instruction "merely distinguished between a common law action for battery and a violation of civil rights to ensure that the plaintiff received full compensation for his in-

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[3] *continued*
her for the deprivation . . . In one sense, no monetary value we place upon constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. . . ." *Id.* at 1227.

[4] The *Phillips* opinion is reproduced in the Appendix at pp. 20-37. In the interests of brevity, the lengthy concurring opinions and separate statements of Judges MacKinnon, Edwards, and Robb have been omitted.

juries." App. A, p. 12. However, this begs the crucial question: Should there be any distinction in damage remedies between the common law of battery and closely analogous Section 1983 cases? Is it proper to give the civil rights plaintiff who sustains a "black eye" more damage theories than the private tort plaintiff with an identical injury? The jury charge created an additional incongruity: Is it proper to give a convicted felon more damage theories, and a potentially larger recovery, than the law-abiding tort plaintiff with an identical injury?

Civil rights cases alleging the excessive use of force by police officers and correctional officers are an extremely common class of cases in the lower federal courts. The recurring nature of the problem, and the conflict among the Circuits in their interpretation of *Carey v. Piphus*, make this an appropriate case for the Court to exercise its certiorari jurisdiction.[5]

2.

**THE DECISION BELOW PRESENTS A SIGNIFICANT QUESTION CONCERNING THE SCOPE OF THE FOURTEENTH AMENDMENT IN PRISONERS' CIVIL RIGHTS LITIGATION.**

In this case, the jury was charged that the inmate could recover against the correctional officers on two separate constitutional theories, under the Eighth and Fourteenth Amendments.[6] These instructions created an anomaly which the Seventh Circuit did not dispel.

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[5] In *Corriz v. Naranjo*, 667 F.2d 892 (10th Cir. 1981), the petition for a writ of certiorari was granted and subsequently dismissed pursuant to Rule 53. ..... U.S. ....., 103 S.Ct. 5 (1982).

[6] Pendent state law claims for battery were also included in the jury charge.

It is by now settled that the Eighth Amendment prohibition against cruel and unusual punishment only applies to those convicted of crimes. *Ingraham v. Wright*, 430 U.S. 651 (1977). Although this Court has never had to decide the question, it seems equally clear that if someone convicted of a crime is physically mistreated while incarcerated, that misconduct is actionable under the Eighth Amendment.[7] See *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir.), *cert. den.* 414 U.S. 1033 (1973).

On the other hand, pre-trial detainees and others not convicted of crimes are protected from physical abuse by the Due Process Clause of the Fourteenth Amendment. *Ingraham v. Wright*, 430 U.S. 651 (1977); *Bell v. Wolfish*, 441 U.S. 520 (1979).

The decision below led to an anomalous result. The prisoner who alleged he was physically mistreated was entitled to more theories of liability—under the Eighth and Fourteenth Amendments—than was the corporally-punished school child in *Ingraham* who was only entitled to a Fourteenth Amendment theory. Moreover, the inmate was entitled to recover damages for the violation of each constitutional right.

When a jury is instructed that it may award damages for "the violation of the constitutional right," the way those rights are enumerated in the jury charge becomes more than a theoretical concern. Of course it is clear that

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[7] In *Ingraham*, the Court stated in dictum:

"Prison brutality is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'" *Ingraham v. Wright*, at 669, quoting *Ingraham v. Wright*, 525 F.2d 909, 915 (5th Cir. 1976).

after conviction, inmates retain certain rights under the Fourteenth Amendment while acquiring the additional protections of the Eighth. But to concede that point does not mean that the inmate, when the time comes for him to be compensated for an injury, should automatically be entitled to more damages, under each constitutional provision, than the injured law-abiding citizen or the school child in the free community.

The Fourteenth Amendment is not a "font of tort law." *Paul v. Davis*, 424 U.S. 693 (1976). In the decision below, the prisoner was afforded an array of liability and damage theories that no one else in our society could have claimed. Certainly if a prisoner sustains a personal injury, and can establish liability under 42 U.S.C. 1983, he should not be compensated less merely because he is a prisoner. But neither should he be compensated more. At some point one constitutional provision should subsume the other so that the aggrieved inmate has one constitutional theory of liability.

If a prisoner alleging he was physically mistreated can claim a cause of action under both the Eighth and Fourteenth Amendments, then logically the prisoner who alleges his medical care is grossly inadequate can do the same. However, in *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that the constitutional adequacy of an inmate's medical care is to be judged solely under the Eighth Amendment. Similarly, the prisoner who alleges his living conditions are grossly inadequate could claim those conditions violate both Amendments. Yet, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), this Court held the Eighth Amendment alone was the proper standard.

Because the decision below creates a substantial degree of uncertainty, and is arguably inconsistent with the

decisions of this Court regarding the proper scope of the Fourteenth Amendment, the petition for a writ of certiorari should be granted.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1746

ROLLINS FREEMAN,

*Plaintiff-Appellant,*

*v.*

GAYLE FRANZEN, *et al.*,

*Defendants-Appellees.*

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Nos. 81-1747, 81-2035

ROLLINS FREEMAN,

*Plaintiff-Appellee,*

*v.*

ALFRED BRANCHE,

*Defendant-Appellant.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-4205—**Marvin E. Aspen**, *Judge.*

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ARGUED JANUARY 7, 1982—DECIDED DECEMBER 15, 1982

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Before WOOD, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and MORGAN, *Senior District Judge.**

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* The Honorable Robert D. Morgan, Senior District Judge for the Central District of Illinois, is sitting by designation.

WOOD, *Circuit Judge*. The plaintiff, Rollins Freeman, a former inmate at the Stateville Correctional Center in Joliet, Illinois, in a jury trial recovered $2,500 compensatory and $1,000 punitive damages against defendant Alfred Branche, and $250 compensatory damages each against defendants Jacobazzi and Bass, all defendants being correctional officers. Thereafter, the trial court granted in part defendants' motions for judgment notwithstanding the verdicts and set aside all awards except the compensatory damage award against Branche. In addition, the court awarded plaintiff $12,000 in attorneys' fees and costs. Branche appeals from the verdict of compensatory damages and the award of attorneys' fees. The plaintiff appeals from the judgment notwithstanding the verdicts as to each defendant.[1]

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[1] The plaintiff argues that the district court erred in granting the judgment NOV because the defendants failed to move for a directed verdict at the close of the evidence, as Fed. R. Civ. P. 50(b) requires. In granting the judgment NOV, the district court expressly found the defendants had moved for a directed verdict in the jury instruction conference after the close of their case.

Both parties attended the conference, which was held without a court reporter present. The district court dismissed George May, an additional defendant, from the case at that time. The plaintiff concedes the defendants' attorney moved for a directed verdict at the conference but argues it applied only to May and excluded the other defendants. Nothing in this argument dispels the district court's express finding otherwise. Courts liberally view what constitutes a motion for a directed verdict, *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 576 (7th Cir. 1976); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), and the fact that the motion was unrecorded does not affect the defendants' ability to preserve the issue for post-verdict motions, *Moran v. Raymond Corp.*, 484 F.2d 1008, 1014 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974), or appeal. Moreover, one lawyer from the Illinois Attorney General's office represented all defendants at trial. He moved for a directed verdict on behalf of all defendants at the close of the plaintiff's evidence. It is difficult to believe that he abandoned that strategy for all defendants except May after the presentation of the defendants' evidence.

I.

The district court, in our judgment, erred in entering judgment NOV for Bass and Jacobazzi. A judgment NOV should only be granted when "without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . . ." *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943). The motion "should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions." *Konczak v. Tyrrell*, 603 F.2d 13, 15 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980) (quoting *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 748 (7th Cir. 1979)). The parties introduced evidence which painted widely disparate accounts of the underlying incident; for the most part, the evidence raised questions of credibility best left to the jury to resolve.

Freeman testified that the defendant Lt. Harris woke him from a sound sleep and, along with two other officers unknown to the plaintiff, pulled him, partially dressed, from his cell. He asserted that the two unidentified officers twisted his arms behind his back, lifted him to his toes, and forced him down the hall. He further testified that, without provocation, a guard, defendant Lowell Rooffener,[2] hit him twice in the forehead.

In contrast to Freeman's account, Lt. Harris, the prison officer supervising transfers in the plaintiff's cellblock, testified that Freeman was dressed, awake, and complaining that he was ill, yet refusing to leave his cell. According to Harris, the plaintiff agreed to cooperate only after Harris promised to call a nurse. Harris testified that when he turned his back, however, the plaintiff began struggling with two guards who were attempting to escort him to the new cell.

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[2] Defendant Rooffener was found not guilty.

The parties disputed the roles Branche, Jacobazzi, and Bass played in the incident. The plaintiff testified that after Rooffener punched him, six or eight guards (including the defendants Jacobazzi and Fleming) converged on him and simultaneously hit and kicked him. Freeman estimated he was hit at least twenty-five times. Curtis Cottrell, a prison guard present at the scene, confirmed that the guards struck Freeman at least ten times. After the group of assaulters moved the plaintiff towards a stairway, the plaintiff claimed that Jacobazzi choked him while the other guards wrestled with him and that Bass and Jacobazzi repeatedly kicked him in the back. Cottrell, corroborating portions of that testimony, stated that between five and eight guards wrestled with the plaintiff and treated him "pretty roughly." Though Cottrell could not identify most of the guards, he testified that Jacobazzi hit and kicked Freeman. Freeman also testified that, while carrying him up three flights of steps to the new cell, Bass and Jacobazzi dragged his hips and back across the metal steps in deliberate disregard of his physical safety. Bass and Jacobazzi denied that contention. Prison personnel filmed this portion of the incident and the jury viewed the videotape twice during trial and once during deliberations.

The defendants assert that they used neither excessive nor unjustified force transferring the plaintiff between cells. All of the defendants testified at trial; each of them either denied personally striking the plaintiff and seeing other guards hit him, or maintained that all their blows followed the plaintiff's assaults on correctional officers. Several defendants testified that plaintiff was kicking and swinging wildly during the incident. Plaintiff acknowledged grabbing defendant Branche's jacket.

The defendants' cumulative testimony indicates that the plaintiff was hit four times. Rooffener admitted hitting Freeman's arms twice to break his grasp on Branche's jacket. Branche testified that he punched Freeman twice in the face with middle or average force; first in retaliation after Freeman hit him and again to protect himself after Freeman tried to grab him. All of the other defendants denied striking the plaintiff.

In light of the divergent accounts of the incident, there existed a material issue of fact. The defendants urge, however, that, considering the plaintiff's lack of credibility, no reasonable person could have believed his testimony. Aside from the fact that Cottrell corroborated many portions of plaintiff's testimony, the evidence on a motion to set aside a verdict must be considered in the light most favorable to the non-moving party, *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1962); *Konczak*, 603 F.2d at 17, and without regard to matters of credibility, *Brady*, 320 U.S. at 479; *see generally* 5A J. Moore & J. Lucas, Moore's Federal Practice 50.02[1] at 50-25 (2d ed. 1982). The plaintiff's version of the events was not patently absurd. Plaintiff's credibility was a question for the jury to decide.

In defending the district court's decision to set aside the verdict, the defendants focus on a note the jury attached to the verdict. The jury originally attempted to return a verdict without assessing compensatory damages against Bass, Jacobazzi, and Branche. The jury recommended that other modes of discipline such as reprimand and suspension be substituted for the damage awards. The district court refused to accept the verdict and returned the jurors for further deliberations, instructing them, "I want to tell you two things: First of all, if you are to assess any compensatory and punitive damages, that may be done only in terms of dollars. Any other suggestions or thoughts you have would be welcome, but the verdict must be in the manner that I suggest." The jury then returned a verdict assessing monetary damages against the defendants. The jury, however, attached another note to the verdict. The note stated:

> We, the jury, because of reasonably [sic] doubt and a lack of sufficient evidence, recommend Mr. Jacobazzi and Mr. Bass, or any other correction officers involved in moving residents or prisoners in large scale security checks, should be cautioned and instructed in the following manner: Specifically speaking of the manner in which a person is carried upstairs within Stateville Correction [sic] Center,

> caution and care should be taken to insure safe and humane methods of [sic] residents or prisoners so no bodily harm or fear is experienced by them.

Ordinarily a recommendation from the jury is disregarded, *Shelton v. United States*, 235 F.2d 951, 954 (4th Cir. 1956), and does not impeach the validity of the verdict, *Rogers v. United States*, 422 U.S. 35, 38 (1975). The defendants argue, that because the jury prefaced its message "because of reasonably [sic] doubt and lack of sufficient evidence," that the note indicates the jury awarded damages without finding liability. The defendants assert that the district court's direction to the jury induced that result.

Despite the defendants' argument, there was no error in the district court's instruction. *See generally United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981). The district court merely informed the jury that monetary damages were the only remedy it could award if it found liability. Apparently satisfied with this explanation, the defendants did not object to the instruction at the time or request further explanatory instructions.

The jury's finding of liability is not necessarily inconsistent with the message attached to the verdict. The message addressed only Bass's and Jacobazzi's conduct in transporting the plaintiff up the stairs. The jury had adequate evidence to find Bass and Jacobazzi liable for beating the plaintiff, without regard to that part of the affair. Consequently, the jury's finding of liability was not necessarily premised on the defendants' conduct in carrying Freeman up the stairs.

In any event, speculation over the note's meaning cannot provide a basis for entering judgment NOV. The district court may enter judgment NOV only when a full evaluation of the evidence presented at trial demonstrates that reasonable men could not reach different conclusions about the verdict. *Konczak*, 603 F.2d at 17. Here the evidence adequately supported the verdict.

The district court also set aside the punitive damage award against Branche. Punitive damages may be awarded in a civil rights action under Section 1983

either upon a showing of "aggravating circumstances" or the defendant's "malicious intent" to deprive the plaintiff of his constitutional rights or to injure him. *Konczak*, 603 F.2d at 18. The evidence presented here, though close, is sufficient to support the jury's finding the satisfaction of that standard. Branche supervised the transfer of all prisoners during the search operation. He was not present when the incident erupted and was notified only that Freeman was struggling with the guards attempting to move him. When Branche arrived, Freeman was wrestling with at least four guards. Branche admitted hitting Freeman twice in the face with a closed fist while wearing a large, metal ring, and while the other guards restrained Freeman. Branche's participation in the incident and Freeman's facial wounds were both videotaped. Aggravating the situation, Branche permitted Freeman's assaulters to continue escorting Freeman without his supervision. These facts and circumstances adequately supported the verdict.

Finally, insufficient reason exists to presume, as defendants argue, that the message from the jury tainted the verdict against Branche. As mentioned, we find the note did not invalidate the verdicts against Bass and Jacobazzi. Because the jury message did not mention Branche, there exists even less reason to suspect that the jury was confused or misled respecting Branche's liability, or that Branche was denied a fair trial. Accordingly, the district court correctly denied Branche's motion for a new trial.

II.

The defendants also cross-appeal from the finding of liability. The defendants argue that the district court erred in instructing the jury that the plaintiff could recover from a deprivation of liberty without due process of law. They assert that the substantive due process clause of the Fourteenth Amendment does not provide prisoners a cause of action for physical injury from the excessive use of force by prison guards. The defendants argue that a prisoner's cause of action exists only under

the Eighth Amendment. As support, the defendants assert that the Supreme Court established a dichotomy between prisoners and other civil rights plaintiffs in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Ingraham v. Wright*, 430 U.S. 651 (1977).

In those cases, the Court held that the Eighth Amendment applied exclusively to individuals actually incarcerated and did not protect pretrial detainees, *Bell*, 441 U.S. at 535 n.16, or school children, *Ingraham*, 430 U.S. 651, 671-72 n.40. In both cases, the Court held that unincarcerated plaintiffs must assert claims of unjustified physical injury by state agents under the Fourteenth Amendment. Because the Court held in *Bell* and *Ingraham* that the Eighth Amendment applies only to prisoners, however, it does not follow that the Fourteenth Amendment does not.

The defendants find additional support for their argument in several Supreme Court decisions which analyze the conditions of prison confinement exclusively under the cruel and unusual punishment standard of the Eighth Amendment and which do not consider whether those conditions violated the Fourteenth Amendment. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Estelle v. Gamble*, 429 U.S. 97 (1976). Although there is no indication that the plaintiffs in those cases raised a claim under the Fourteenth Amendment, the defendants argue that the cases demonstrate further that the Supreme Court considers a prisoner's cause of action for excessive use of force lies pursuant to the Eighth Amendment to the exclusion of the Fourteenth Amendment.

The Second Circuit rejected an identical argument in *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980). That court held that a prisoner's complaint, which alleged that an unprovoked beating by a prison guard unconstitutionally deprived him of liberty under the Fourteenth Amendment, stated a claim under 42 U.S.C. § 1983. Following *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), the court in *Martinez* rejected the argument that the plaintiff did not have a

cause of action under the Fourteenth Amendment.[3] Other circuits have reached the same conclusion. *Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971) (per curiam); *Wiltsie v. California Department of Corrections*, 406 F.2d 515, 517 (9th Cir. 1968). *See also Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973).

Nor does a finding of liability here, as defendants claim it will, transform Section 1983 into a "font of tort law," as the Supreme Court declined to do in *Paul v. Davis*, 424 U.S. 693, 701 (1976). In *Johnson v. Glick*, the court noted that a prison guard's liability for the use of excessive force under 42 U.S.C. § 1983 is not co-extensive with common law tort liability for battery. *Cf. Baker v. McCollan*, 443 U.S. 137, 146 (1979) (false imprisonment); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (medical malpractice). The *Johnson* court stated:

> The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.

481 F.2d at 1033. Consequently, the court in *Johnson* held that the district court in determining whether the plaintiff established a deprivation of liberty under § 1983 should consider several factors, including the

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[3] In *Johnson v. Glick*, the Second Circuit stated:

> [B]oth before *and after* sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment. . . . *Rochin v. California*, 342 U.S. 165 (1952), must stand for the proposition that, quite apart from any "specific" of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.

481 F.2d at 1032 (citations omitted) (emphasis added).

> need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

*Id.* at 1033. Here, the district court below did not err in instructing the jury that the law allowed a prisoner to recover damages for a deprivation of liberty without due process of law.

The defendants also contend that the district court failed to instruct the jury on the meaning of two phrases, "unlawful attack" and "lawful authority," used in the jury instructions. The court, however, instructed the jury that prison guards under state law had lawful authority to use the physical force necessary to protect themselves from physical harm and to enforce an inmate's compliance with valid commands. The court further instructed the jury that the defendants acted unlawfully if they used greater force than necessary to accomplish a lawful purpose. Consequently, considering the instructions as a whole, the district court adequately and fairly instructed the jury.

The defendants further argue that the instruction at issue encouraged the jury to place a pecuniary value on the constitutional right lost. Contrary to the defendants' contention, the instruction did not direct the jury to award compensation for the inherent value of the constitutional right itself. The instruction merely told the jury to consider as an "element of damages" the fact that the rights lost were constitutional rights.

The district court instructed the jury that if it found the defendants liable, the jury was to consider the nature, extent, and duration of the plaintiff's physical injury as well as his humiliation, mental distress, and general pain and suffering in measuring damages. The district court further instructed the jury to account for the "violation of

[the plaintiff's] constitutional rights" in its assessment.[4] Having objected to this last portion of the instruction at trial, the defendants argue on appeal that it is directly contrary to the Supreme Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978).

In *Carey*, the Court rejected the argument that monetary damages may be awarded for the loss of constitutional rights because the rights are "valuable in and of themselves," *id.* at 254, holding that only "actual" injury is compensable under Section 1983. The Court stated that the

> basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights. . . . Rights, constitutional or otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

*Id.* The Court concluded that the policy of deterrence of constitutional violations, however strong, did not justify a departure from "[t]he cardinal principle of damages in Anglo-American law" that damages are to provide "*compensation* for the injury caused to the plaintiff by defendant's breach of duty." *Id.* at 254-55 (quoting 2 F. Harper & F. James, *Law of Torts*, § 25.1 at 1299 (1956) (emphasis in original)).

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[4] In full, the district court instructed the jury:

> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the wrongful conduct of the defendant or defendants. One, the nature, extent, and duration of the injury. Two, general pain and suffering. Three, humiliation. Four, mental distress. Five, the violation of the constitutional right.

Although *Carey* involved purely procedural due process rights,[5] the lower courts in subsequent decisions have extended the reasoning in *Carey* to rule that plaintiffs may recover compensatory damages solely for actual injuries in Section 1983 cases involving a denial of *substantive* due process rights. *See, e.g., Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980); *Morrow v. Ingleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978). Following this course, we recently held in *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982), that a pretrial detainee who failed to prove actual injury from the unconstitutional restriction on his access to reading material in jail could recover only nominal damages. "Because the purpose of section 1983 is to compensate for the injuries resulting from a deprivation of constitutional rights, [the plaintiff] must demonstrate that the restrictions found unlawful here caused some compensable injury." *Id.* at 745-46; *see also Endicott v. Huddleston*, 644 F.2d 1208, 1216-17 (7th Cir. 1980) (denial of procedural due process), and *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981) (a case involving procedural due process).

The instructions at issue neither encouraged nor allowed the jury to award Freeman damages in the absence of actual injury. Instructing the jury to assess damages according to the nature, extent, and duration of the physical injury, general pain and suffering, humiliation, and mental distress, and the violation of the plaintiff's constitutional rights, the district court merely distinguished between a common law action for battery and a violation of civil rights to ensure that the plaintiff received full compensation for his injuries. Physical in-

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[5] The plaintiff in *Carey* was a public high school student suspended from classes without a hearing. In an action for monetary damages under § 1983, the student alleged that the failure to allow him an opportunity to defend against the accusations which caused the suspension deprived him of his constitutional right to procedural due process.

jury as well as intangible injuries, such as pain and suffering, personal humiliation, mental distress, and embarrassment are compensable injuries under Section 1983. *Kincaid*, 670 F.2d at 737 n.16; *Busche*, 649 F.2d at 519; *Baskin v. Parker*, 602 F.2d 1205, 1209 (5th Cir. 1979); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579-80 (7th Cir. 1975); *Seaton v. Sky Realty Corp.*, 491 F.2d 634, 636 (7th Cir. 1974). The evidence at trial showed the guards repeatedly punched and kicked Freeman in the back, face, and testicles. Freeman testified that after the beating his entire body hurt and that he was taken to the prison hospital for treatment. Though the parties agreed that Freeman suffered no permanent eye injury, he complained of continuing pain.

The jury has wide latitude in assessing damages in order to fairly compensate a plaintiff in a civil rights action for physical and mental injuries. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981). In light of the plaintiff's testimony and the number of guards involved, the damages awarded Freeman were certainly not excessive.

The defendants argue, alternatively, that even if the district court did not direct the jury to award damages for the inherent value of the substantive constitutional rights lost, the instruction permitted the jury to presume actual damages without direct proof of their existence. The plaintiff's testimony at trial established that he suffered actual, compensable injury as a consequence of the beating. Thus, the evidence amply supports the award of damages without the use of a presumption.

## III.

Finally, the district court awarded the plaintiff $12,000 in attorneys' fees under 42 U.S.C. § 1988. The plaintiff originally requested $22,000 in fees representing 346 hours of work. In reaching this conclusion, the district court explained only that it had considered the factors laid out in *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980).

The defendants do not dispute that the plaintiff is a "prevailing party" entitled to fees as a matter of course unless "special circumstances" dictate otherwise. *Harrington v. DeVito*, 656 F.2d 264, 268 (7th Cir. 1981); *Konczak*, 603 F.2d at 19. They contest only the reasonableness of the amount of fees awarded.

The district court, in its discretion, may set the amount of attorneys' fees awarded. That determination may be set aside on appeal only for a clear abuse of discretion. *Konczak*, 603 F.2d at 19. Some articulation of the reasons behind the district court's decision is necessary, however, for effective appellate review. While a failure to articulate precise reasons to support an award of fees does not indicate *a fortiori* that the district court abused its discretion, *Harrington*, 656 F.2d at 269, here the district court supplied no reasons to explain its decision. It is not the role of this court to speculate on the reasons which may have supported the decision. Some explanation of the decision and consideration of the current result in the case is necessary before we can address the defendants' arguments that the district court abused its discretion in awarding $12,000 in attorneys' fees. Consequently, we remand this question to the district court for additional consideration.[6]

For the foregoing reasons, the district court's entry of judgment NOV for defendants Bass and Jacobazzi is reversed and the jury verdicts are reinstated. The setting aside of punitive damages against defendant Branche is reversed. The denial of defendant Branche's motion to set

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[6] In light of this disposition, we decline now to review the evidence presented to the district court on the issue of attorneys' fees and to consider the defendants' argument that the district court abused its discretion by not requiring the plaintiff's lawyers to produce original billing records to substantiate their claims about the number of hours actually worked on the case.

aside the judgment against him for compensatory damages is affirmed. The case is remanded on the issue of attorneys' fees.

A true Copy.

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

Opinion by Judge Wood
JUDGMENT—ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 15, 1982
Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT D. MORGAN, Senior District Judge*

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No. 81-1746
ROLLINS FREEMAN,

*Plaintiff-Appellant,*

*v.*

GAYLE FRANZEN, et al.,

*Defendants-Appellees.*

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Nos. 81-1747, 81-2035
ROLLINS FREEMAN,

*Plaintiff-Appellee,*

*v.*

ALFRED BRANCHE,

*Defendant-Appellant.*

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79-C-4205—**Marvin E. Aspen**, *Judge.*

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* Honorable Robert D. Morgan, Senior District Judge for the Central District of Illinois, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED IN PART AND AFFIRMED IN PART, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

# APPENDIX C

CORRECTED
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED FEBRUARY 3, 1983
February 1, 1983

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge
Hon. ROBERT D. MORGAN, Senior District Judge*

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ROLLINS FREEMAN,

*Plaintiff-Appellant,*

*v.*

No. 81-1746
GAYLE FRANZEN, et al.,

*Defendants-Appellees.*

---

ROLLINS FREEMAN,

*Plaintiff-Appellee,*

*v.*

Nos. 81-1747, 81-2035
ALFRED BRANCHE,

*Defendant-Appellant.*

---

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79-C-4205—**Marvin E. Aspen**, *Judge.*

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* The Honorable Robert D. Morgan, Senior District Judge for the Central District of Illinois, is sitting by designation.

## ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by the defendants, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

# APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 80-2171

CHARLES PHILLIPS, ET AL.

v.

DISTRICT OF COLUMBIA, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 79-01726)

Argued November 23, 1981
Decided January 11, 1983

*Edward E. Schwab*, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel and *Michael Zielinski*, Assistant Corporation Counsel were on the brief, for appellants. *David P. Sutton*, Assistant Corporation Counsel also entered an appearance for appellants.

*Peter J. Nickles*, with whom *Ellen Bass*, *Joseph M. Fisher* and *Charles E. M. Kolb* were on the brief, for appellees.

Before: MACKINNON and EDWARDS, *Circuit Judges*, and ROBB, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate statements filed by MACKINNON and EDWARDS, *Circuit Judges.*

EDWARDS, *Circuit Judge*: Appellees, inmates in the Lorton Maximum Security Facility ("Maximum"), brought this class action against the District of Columbia and several of its officials and employees, challenging the conditions of their confinement on a variety of constitutional, statutory and common law grounds. At trial, appellees presented evidence of their exposure to the danger of violent assault and sexual abuse—a situation allegedly caused or exacerbated by understaffing, deficient security equipment and procedures, inadequate systems for classifying and segregating prisoners, and a poorly designed and deteriorating physical plant. The case was submitted to a jury, which returned a verdict finding that the appellants had violated (a) the Eighth Amendment to the United States Constitution; (b) their duty of due care under the common law; and (c) their statutory duty to provide the inmates with "safekeeping, care, protection, [and] instruction."[1] The jury awarded to each member of the class of appellees damages in the amount of one dollar for each day of incarceration between July 4, 1976 and June 20, 1980. The trial judge supplemented that award with injunctive relief designed to ameliorate conditions in Maximum found to be violative of applicable common law, statutory and constitutional standards.

Appellants attack the verdict and the awards of relief on several grounds.[2] We find merit in four of the

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[1] The last of the three violations was predicated upon D.C. CODE ANN. § 24-442 (1981). The trial judge inexplicably failed to charge the jury on two of the appellees' statutory causes of action. That omission has not, however, been challenged on appeal.

[2] In addition to the defects discussed below, appellants assigned as error (i) the District Court's decision not to enforce

(Footnote continued on following page)

allegations of error. First, the issuance of a protective order sharply curtailing the ability of appellants' counsel to discuss with their clients information obtained during discovery constituted, we conclude, an abuse of discretion. Second, the failure to instruct the jury that appellants could not be held liable on a *respondeat superior* theory for constitutional torts committed by prison guards was error. Third, the instruction concerning the danger posed to weaker inmates by their proximity to a group of violence-prone prisoners was misleading. Fourth, the authorization to the jury to award appellees damages for the intrinsic value of their constitutional rights was inconsistent with controlling precedent.

## I. THE PROTECTIVE ORDER

In the course of trial preparation, appellees expressed reluctance to comply with appellants' discovery requests, fearing that the information they provided would somehow be transmitted to correctional officers inside Maximum and thence to other prisoners. The net result, they pointed out, would be to expose them to serious risk of violent reprisal. Appellants responded that they needed the information in question in order to prepare their defense. The trial judge attempted to devise a compromise solution to this dilemma. She granted appellants' motion to compel discovery. But, soon thereafter, she also granted appellees' motion for a protective order, pursuant to FED R. CIV. P. 26(c), designed to prevent the

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[2] *continued*
the notice requirement embodied in D.C. CODE ANN. § 12-309 (1981), (ii) the court's refusal, despite the supposed absence of proof of "actual physical injury," to direct a verdict for appellants on the local law claims, (iii) the court's supposed failure to instruct the jury that to state a claim under the Eighth Amendment one need prove more than negligence, and (iv) the court's refusal to allow the jury to consider the fact that the District of Columbia does not control its own budget and appropriations. All four arguments are frivolous.

facts revealed or allegations made in the course of discovery from entering the prison "grapevine."

Our first task is to determine just how much the District Court restricted the ability of appellants' counsel to make use of the information they obtained. Unfortunately, the order was inartfully drafted. Viewed in isolation, it might be interpreted as prescribing only the situs of communications between appellants and their attorneys.[3]

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[3] The full text of the order reads:

> Upon consideration of plaintiffs' motion for protective order and defendants' response thereto, it is by the Court this 7th day of May 1980,
>
> ORDERED that plaintiffs' motion for protective order be and the same is hereby granted, and that counsel for defendants are directed that all deposition materials, including the reporter's tapes and notes, any prepared transcripts, as well as any documents or other tangible items produced by plaintiffs and other class members be placed under seal and not be publicly used or otherwise published by counsel for the defendants, defendants, or any of their agents, employees, officers or servants outside the offices of the District of Columbia Corporation Counsel until all unresolved questions as to their production and ultimate use at trial be brought before this Court for final resolution at the time of the pretrial conference. This protective order shall apply to the following areas of inquiry: class members' possession of weapons and contraband; their knowledge of other persons' participation in assaults or similar incidents; other persons' possession of weapons or contraband; identities and other information concerning correctional officers who conduct improper searches or otherwise violate regulations or reasonable procedures designed for the security or safety of the residents. Furthermore, defendants are barred from using the testimony and documents obtained in any disciplinary, administrative, or other judicial proceeding involving any plaintiff or other class member.

Appendix ("App.") 84-85.

Appellees argue, with some force, that the ban on disclosures "by counsel for the defendants, defendants, or any of their agents" presumes rather than forbids communication between

(Footnote continued on following page)

But such a reading would be inconsistent with the intent and understanding of the parties and, apparently, of the trial judge. Appellees certainly *sought* an order "prohibit[ing] defendants' counsel from in any way making known to the defendants information provided by plaintiff class members in depositions or other discovery proceedings."[4] Furthermore, the District Court explicitly stated that "plaintiffs' motion for protective order be and the same is hereby granted"[5] and gave no indication that the terms of the decree were any different from those requested; this strongly suggests that the order should be construed to comport with appellees' original plea. Any qualms we might have concerning such a construction are removed by the fact that the subsequent conduct of appellants, appellees and the trial judge makes plain that they all assumed that no discussion was permitted between appellants and their counsel concerning the fruits of discovery. The issue presented for review, therefore, is the validity, on the facts of this case, of a protective order forbidding not only all dissemination to the public but all disclosure by counsel to their clients of information of specified sorts obtained during discovery.

In general, district courts have broad authority, under FED. R. CIV. P. 26, to distinguish reasonable and productive uses of the discovery procedures from abusive invocations of those procedures and to design protective orders to curtail the latter. *See Keyes v. Lenior Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S.

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[3] *continued*
appellants and their lawyers and that the order merely requires that all conversations take place in "the offices of the District of Columbia Corporation Counsel." Nevertheless, given the undisputed facts of this case, *see* text at notes 4-5 *infra*, we are constrained to construe this language as intending to restrict further dissemination of any information already in the hands of defendants. Otherwise, we must conclude that the language simply reflects clumsy draftsmanship.

[4] Motion for Protective Order, App. 75.

[5] *See* note 3 *supra*.

904 (1977). Appellate courts will overturn such judgments only upon a clear showing of an abuse of discretion. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

Protective orders that restrict dissemination to the public of discovered information, however, stand on a somewhat unusual footing. The resultant infringement of interests protected by the First Amendment, we have held, requires a district court to be careful to grant such an order only when essential to shield a party from significant harm or to protect an important public interest. *In re Halkin*, 598 F.2d 176, 190-91 (D.C. Cir. 1979). Moreover, the court must tailor the restraint so as to sweep no more broadly than necessary. *Id.* at 191.

District courts must be equally chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor. Such orders arguably trench upon constitutional interests at least as important as those infringed by restrictions on public dissemination of information. It is, of course, well established that due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In many situations, the right to a hearing would be meaningless were the litigant forbidden to obtain the assistance of a lawyer in determining the nature of the claims against him, the opposing arguments available to him, and the manner in which his case would be most effectively presented. *See* Note, *The Indigent's Right to Counsel In Civil Cases*, 76 YALE L.J. 545, 548-49 (1967). The foregoing considerations have prompted the Supreme Court to observe, in dictum:

> If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal

> would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

*Powell v. Alabama*, 287 U.S. 45, 69 (1932) (emphasis added). Relying on similar arguments, some lower courts have expressly held that a civil litigant has a constitutional right to the assistance of hired counsel. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-18 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Roberts v. Anderson*, 66 F.2d 874, 876 (10th Cir. 1933); *Rex Investigative and Patrol Agency, Inc. v. Collura*, 329 F. Supp. 696, 699 (E.D.N.Y. 1971) (dicta).

In order to decide the case before us, we need not elevate to constitutional status the right to the aid of counsel. It is sufficient for present purposes to recognize simply that every litigant has a powerful interest in being able to retain and consult freely with an attorney. Insofar as the fair administration of justice requires that all parties to a controversy be fully and equally informed of their entitlements, the public has a similarly important interest in preserving the ability of each disputant to confer with his lawyer. This public interest is reinforced by the value we place on the right of every litigant to participate in the process whereby justice is done—to understand and become involved in the proceeding, not to be compelled passively to await its outcome.[6] Regardless of whether these considerations are deemed to be inherent in the principle of due process, they must be accorded considerable weight by a trial judge when considering the propriety of issuing a protective order under FED. R. CIV. P. 26(c).[7]

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[6] *See* Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502-03 (1978).

[7] Our insistence that the trial judge recognize the importance of these factors is not undermined by the fact that his discretionary control over the discovery process includes the power to cut off inquiry altogether in order "to protect a party or person from annoyance, embarrassment, oppression, or un-

(Footnote continued on following page)

We conclude, therefore, that the criteria set forth in our decision in *In re Halkin* as prerequisites for the issuance of an order restricting public dissemination of information obtained through discovery are equally applicable to the issuance of an order forbidding counsel to reveal such information to his client:

> The court must . . . evaluate such a restriction on three criteria: the harm posed by [disclosure] must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on [attorney-client relations].

598 F.2d at 191 (footnotes omitted).

We do not intend these guidelines to be prohibitive in practice. Indeed, when serious harm to a party or to the community cannot be avoided without either forbidding discovery altogether or curtailing communication between one of the litigants and his attorney regarding discovered materials, the court should issue such a

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[7] *continued*
due burden or expense." FED. R. CIV. P. 26(c). Merely because the government (here acting through the judiciary) may withhold a benefit or "privilege" entirely does not mean that it is free to condition the receipt of such an entitlement on the recipient's renunciation of a constitutional right. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (state may not "condition the availability of [unemployment] benefits upon [the recipient's] willingness to violate a cardinal principle of his religious faith"); *Arnett v. Kennedy*, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting) (observing that "a majority of the Court rejects Mr. Justice Rehnquist's argument that because appellee's entitlement arose from statute, it could be conditioned on statutory limitation of procedural due process protections . . . ."); TRIBE, *supra* note 6, at 510. We believe that the force in the present context of the foregoing principle would not be diminished even if a litigant's interest in consulting freely with his lawyer were not held to be constitutionally protected.

protective order.[8] But, to reiterate, the court must be confident that the potential injury is substantial and cannot be prevented through the use of any device less restrictive of a party's access to his lawyer.

Applying the foregoing standards to the instant case,[9] we are compelled to conclude that the District Court abused its discretion in issuing the protective order requested by appellees. The first of the three *Halkin* criteria does seem to have been satisfied. Affidavits submitted by appellees, detailing the danger of retaliation to which they would be exposed if persons inside the prison learned of allegations they made in the course of discovery, were more than sufficient to show that "substantial and serious harm" might well have resulted from dissemination of the information in question.[10] The second requirement also seems to have been satisfied. The order was limited to designated "areas of inquiry;"[11] and informa-

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[8] Such orders have frequently been issued, under FED. R. CIV. P. 26(c)(7), to prevent disclosure to a party's business competitor(s) of "trade secret[s] or other confidential research, development, or commercial information." *See, e.g., Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 237 (S.D.N.Y.), *aff'd*, 573 F.2d 1288 (2d Cir. 1977); *Maritime Cinema Serv. Corp. v. Movies in Route, Inc.*, 60 F.R.D. 587, 590 (S.D.N.Y. 1973).

[9] Our analysis of the application of the legal standards proceeds on the assumption that the only significant effect of the protective order was to forbid disclosure of the discovered information to appellants by their counsel. *See text at notes 4-5 supra.* Though the order by its terms also proscribed dissemination of the information to the public, *see* note 3 *supra*, appellants have not contended that they had any interest in publicizing the facts revealed and allegations made by appellees. Accordingly, the test set forth in *Halkin* controls this case because the order restricted attorney-client consultation, not because it intruded upon interests shielded by the First Amendment.

[10] *See* Affidavit of Jeffrey Jackson, ¶10, App. 173; Affidavit of Deborah Jones, ¶12, App. 178.

[11] *See* note 3 *supra.*

tion or charges of specific sorts identified likely would have provoked retribution if communicated to the incriminated parties. The third criterion, however, was not satisfied. The District Court could have formulated a decree that would have been equally effectual in preventing retaliation and would not have inhibited consultation between appellants and their attorneys. The possibility that springs most readily to mind is a ban on communication (concerning matters learned through discovery) between the defendant prison officials and any of the prison guards or inmates. Under these circumstances, it was error to issue the order.

Appellants insist that, having found an abuse of discretion in the issuance of the protective order, we need not determine whether they suffered any demonstrable prejudice thereby. An infringement of the right to consult with one's attorney, they claim, is so serious as to be grounds for reversal even in the absence of a showing of harm. We need not address this argument because the injury to appellants in the instant case was palpable. They were prevented, not only from conferring with their lawyers regarding how best to respond to appellees' allegations but even from checking their files for information relevant to the charges made. Such restrictions certainly impaired their ability to prepare their case. We conclude, therefore, that the trial was tainted by the overly broad order and that, consequently, the verdict must be vacated.

## II. The Absence of a Respondeat Superior Instruction

It is now established that local governing bodies may not be held liable, solely on the basis of a *respondeat superior* theory, for constitutional torts committed by their employees.[12] Some of the testimony presented at

[12] *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978) (suit brought under 42 U.S.C. § 1983 (Supp. IV 1980)); *Tarpley v. Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982) (suit brought directly under the Constitution).

trial and a portion of appellees' counsel's closing argument might have been interpreted by the jury as implying that the District of Columbia was legally responsible for the consequences of unauthorized actions of individual prison guards.[13] The trial judge did not give the jury an instruction foreclosing such an interpretation. That omission was error.

## III. The Instruction on the Intermingling of Inmates

In the course of her instructions regarding whether the level of violence at Maximum violated the Eighth Amendment, the trial judge told the jury that they might consider the adequacy of the prison's system for classifying and segregating prisoners and, more specifically, the fact that "inmates who have participated in or have the potential for committing violence are placed in separate tiers of the same cellblock with prisoners who have been attacked or are particularly vulnerable to attack." App. 140. This instruction was factually accurate but somewhat misleading, insofar as it implied that the proximity of the two groups endangered the weaker prisoners, while the evidence supporting that inference was meager.[14]

The prejudice suffered by appellants as a result of either this or the foregoing mistake on the part of the trial judge does not appeal to have been substantial. Were these the only flaws in the proceedings below, we might be inclined to discount them as harmless error. But, because we have concluded that the abuse of discretion in issuing the protective order dooms the verdict, we need

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[13] *See, e.g.*, Transcript ("Tr.") 747, 749, 751-52, 757-58, 760, 761 (elicitation of admissions of "procedural violations" by guards); Tr. 1143 (counsel's ambiguous argument concerning the legal significance of such violations).

[14] Indeed, appellees never disputed evidence presented at trial by appellants indicating that the gates between the two tiers were never opened. Tr. 633.

not speculate regarding the actual impact of the flaws in the instructions relating to permissible theories of liability and the intermingling of prisoners. However, we of course expect that these mistakes will be avoided in the new trial.

## IV. Damage Awards for the Imposition of "Cruel and Unusual Punishment"

The fourth and final defect in the proceedings below relates to a portion of the charge to the jury that reads as follows:

> If your verdict is for the plaintiffs, you must then proceed to determine the amount of damages.
>
> Damages or injury must be proved by the persons who seek to be compensated. Actual damages are imposed to compensate the plaintiffs for injuries they have actually sustained. You are not to award damages for any injuries the plaintiffs may have suffered unless plaintiffs establish by a preponderance of the evidence in the case that the injuries were proximately caused by the defendants' wrongful conduct.
>
> . . . .
>
> It is not necessary that actual physical injury be shown in order for plaintiffs to recover in this action. If you find that plaintiffs were caused to suffer discomfort, mental or emotional distress or any other actual damage, as a result of defendant's wrongful acts or omissions, they are entitled to recover damages to compensate them for those injuries.
>
> If you find that defendant [sic] deprived plaintiffs of their constitutional rights, you may award plaintiffs damages for that deprivation. There is no precise formula for calculating these damages. Nevertheless, although the value of the plaintiffs' constitutional rights is difficult to assess, it must be considered. Thus, if you find that defendants

> violated plaintiffs' constitutional rights, you should arrive at a damage figure based upon consideration of equity, reason and pragmatism.

App. 145-47. This and other language in the trial judge's charge makes it reasonably clear that the jury was not to award anything more than nominal damages to the plaintiffs in the absence of a showing of some actual injury. But the instruction does seem to leave open another possibility: if the jury concluded the plaintiffs had suffered actual harm, they might award damages to compensate them for (i) their physical injuries; (ii) their mental distress; *and* (iii) the intrinsic value of their constitutional rights—evaluated "upon consideration of equity, reason and pragmatism."

The legal standards against which such a charge must be measured are not altogether clear. Upon examination of the relevant case law, however, we are compelled to conclude that the permission granted the jury to compensate appellees for the value of their violated rights constituted reversible error.

Analysis of the applicable doctrine must begin with the opinion in *Carey v. Piphus*, 435 U.S. 247 (1978). The Supreme Court there held that

> the basic purpose of a [42 U.S.C.] § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights .... Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

*Id.* at 254. The Court's opinion does include language suggesting that portions of its rulings are applicable only to damage awards for violations of procedural due process. *Id.* at 258-59, 264-65. But, fairly read, those comments relate only to the identification and measurement of the particular interests shielded by different constitutional provisions. As the language quoted above indicates, the Court meant to extend the basic "compensa-

tion principle" to *all* constitutional rights, substantive as well as procedural. It is disingenuous to suggest otherwise.[15] It is equally apparent that the Court intended to require, not just that plaintiffs demonstrate actual injury before they secure more than a nominal recovery, but that damage awards be *limited* to sums necessary to compensate plaintiffs for actual harm.[16]

By its terms, *Carey* explicitly governs only suits brought under 42 U.S.C. § 1983. But it would be difficult to defend a refusal to extend the holding of the case to suits brought directly under the Constitution—so-called *Bivens* actions.[17] The bodies of law relating to the two forms of litigation have been assimilated in most other respects.[18] Although the Court in *Carey* justified its decision partly on the basis of the legislative history of section 1983,[19] which of course is not applicable to suits brought under the Constitution, other aspects of its rationale are

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[15] For opinions seeking to explain away *Carey*'s adoption of the compensation principle, see *Halperin v. Kissinger*, 606 F.2d 1192, 1207 nn. 100-01 (D.C. Cir. 1979), *aff'd per curiam by an equally divided Court, in part, cert. dismissed, in part*, 452 U.S. 713 (1981); *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979) (alternative holding), *cert. denied*, 444 U.S. 1016 (1980).

[16] Similar views are adopted in *Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979); *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Atcherson v. Siebenmann*, 458 F. Supp. 526, 537 (S.D. Iowa 1978), *rev'd in part on other grounds and remanded*, 605 F.2d 1058 (8th Cir. 1979).

[17] The reference is to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Jurisdiction in such suits is predicated on 28 U.S.C. § 1331 (Supp. IV 1980).

[18] *See, e.g., Butz v. Economou*, 438 U.S. 478, 498-504 (1978) (same "qualified immunity rules); *Tarpley v. Greene*, 684 F.2d at 9-11 (same rules concerning theories of liability to which municipalities are exposed); *Paton v. LaPrade*, 524 F.2d 862, 871 (3d Cir. 1975) (same standards for determining compensable injuries).

[19] 435 U.S. at 255-57.

equally pertinent to *Bivens* actions. Certainly the general assertion that constitutional rights protect particular interests and are to be valued solely by reference to those interests is transferrable to the *Bivens* context. And the problems associated with leaving juries free to guess at the "inherent value" of constitutional rights are equally germane to the two kinds of suits.[20]

How, then, do these principles bear upon a suit challenging prison conditions on the basis of the Eighth Amendment? The Supreme Court instructs us that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . ." *Carey v. Piphus*, 435 U.S. at 259. In applying that injunction to suits like the one at bar, we must remember that we are dealing with prisoners, who in most instances are persons who have been convicted of committing serious crimes. As the Supreme Court has observed in a different context:

> [W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. . . .
>
> But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

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[20] *Cf.* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980), which argues vigorously for delimitation of the Carey principle but acknowledges that valuation of constitutional rights on any other basis would be difficult and that any judicial constraints on the measurement process would be, at best, problematic, *id.* at 988-90.

*Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (citations omitted) (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948).

With these admonitions in mind, it is fair to conclude that the interests of prisoners shielded by the ban on "cruel and unusual punishment" correspond reasonably closely to the interests protected by analogous common-law tort rules.[21] *See Carey v. Piphus*, 435 U.S. at 257-58. Specifically, it would appear that prisoners may recover for the infringement of three interests: (i) bodily integrity; (ii) peace of mind;[22] and (iii) earning capacity.[23] In other words, plaintiffs are entitled to compensation for any physical injuries, pain and suffering, emotional distress,[24] and impairment of their prospects for future

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[21] Note that the analogies drawn are not limited to measures of recovery associated with the tort of false imprisonment but extend to damage theories relating to the more general categories of intentional and negligent harm. *Cf. Clappier v. Flynn*, 605 F.2d at 529 ("The interest protected by the common law of negligence . . . parallels closely the interest protected by the Eighth Amendment . . . .").

[22] See RESTATEMENT (SECOND) OF TORTS §§ 46, 905(b) (1977).

In *Carey*, the Supreme Court went out of its way to sanction the award of compensation for emotional harm—on the condition that the plaintiff provides evidence thereof. 435 U.S. at 263-64 & n.20.

[23] *See* RESTATEMENT (SECOND) OF TORTS § 906(b) (1977).

While it must be acknowledged that there is no constitutional right to rehabilitation, *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981), it would seem equally clear that prisoners have a right not to be subjected to conditions (apart from the reasonable incidents of incarceration itself) that *reduce* their ability to earn a living and otherwise to conduct themselves in the world following their release.

[24] It may well be possible, in an appropriate case, to infer the infliction of emotional distress from the circumstances of the violation. *See Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974). While the Court in *Carey* seemed to frown on such a mode of proof in the context of procedural due process, 435 U.S. at 263-64 & n.20, such inferences likely would be much more reliable when the plaintiff has been subjected to "cruel and unusual punishment."

employment proximately caused by the defendants' unconstitutional conduct.

In considering these questions, it is well to keep in mind that the Supreme Court has often observed that constitutional tort actions—both of the section 1983 and of the *Bivens* variety—have an important deterrent function. *See Carlson v. Green*, 446 U.S. 14, 21, 24-25 (1980); *Butz v. Economou*, 438 U.S. 478, 505 (1978).[25] While, as the Court has indicated, it is improper to award damages *merely* for the purpose of discouraging future constitutional violations by other governmental officials, protection of constitutional rights requires that compensation for actual injuries be adequate. As this court has said before:

> [I]n cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts."

*Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (footnotes omitted) (quoting *Tatum v. Morton*, 562 F.2d 1279, 1282 (opinion for the court), 1287 (Wilkey, J.,

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[25] *See also* Note, *Damage Awards for Constitutional Torts*, *supra* note 20, at 980-81. The obstacles faced by a victim of unconstitutional conduct to securing judgment in his favor, as well as structural problems in the impact of such decisions, may well make damage awards a less than ideal device for deterring future violations. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 48-52 (1980). But the suggestion that, for deterrent purposes, we abandon damage awards entirely in favor of equitable relief, *id.*, ignores the utility of discouraging officials other than those involved in the case at bar from engaging in unconstitutional behavior.

concurring) (D.C. Cir. 1977)), *aff'd per curiam by an equally divided Court, in part, cert. dismissed, in part,* 452 U.S. 713 (1981).

Unfortunately, the jury in the instant case was permitted to award more than liberal compensation for actual harm. They were also instructed to determine—and to award damages for—the intrinsic value of the plaintiffs' Eighth Amendment rights. The likelihood that they obeyed that instruction is sufficiently great to necessitate a new trial.

## V. CONCLUSION

For the foregoing reasons, the judgment is reversed and the awards of damages and equitable relief are vacated.[26] The case is remanded for a new trial in accordance with this opinion.

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Separate statements will be filed by *Circuit Judge* MACKINNON and *Circuit Judge* EDWARDS sometime shortly after the issuance of the foregoing opinion for the court.

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[26] The District Court, on remand, will of course be free to consider the propriety of granting equitable relief, pursuant to FED. R. CIV. P. 65, pending the outcome of the new trial, that incorporates the terms of the original equitable decree.